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IN THE

# Supreme Court of the United States

No. 611

JAMES WILLIAM MOORE, JAMES THOMAS FRASIER and GLENN E. DAVIDSON,
*Petitioners,*

vs.

STATE OF ARKANSAS,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI

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JAMES WILLIAM MOORE, JAMES THOMAS FRASIER and GLENN E. DAVIDSON,
*Petitioners,*

vs.

STATE OF ARKANSAS,
*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI

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Your petitioners, James William Moore, James Thomas Frasier and Glenn E. Davidson pray that a writ of certiorari issue to review judgment of the Supreme Court of the State of Arkansas entered in the above entitled case on July 15, 1968.

## OPINIONS BELOW

The judgment of the Circuit Court of White County, Arkansas, is not reported. The opinion of the Court of Appeal (infra—Appendix a, p. 25, is reported at 244 Arkansas 1197).

## JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on June 3rd 1968. (infra—Appendix a—page 25).

That the petitioners filed their petition for rehearing on June 18, 1968, on the judgment and sentence rendered against them on the 3rd day of June, 1968, which was heard and overruled by the Supreme Court of Arkansas on July 15, 1968, and the Supreme Court of Arkansas at that time stayed execution of the mandate issued on June 3, 1968, for a period of 60 days. That on the 13th day of September, 1968, the Supreme Court of Arkansas again stayed the issuing of the mandate for an additional period of 25 days in order that the petitioners herein be allowed to appeal judgment and execution rendered against them on the 13th day of June, 1968, to the Supreme Court of the United States. The jurisdiction of this Court is invoked under the provisions of Title 28 U.S.C.A., Section 1257 (3) and Rules of Supreme Court—Rule 19.

## QUESTIONS PRESENTED

1. Was the trial court erroneous in allowing evidence to be introduced over the objections of the petitioners, which evidence was in violation of their rights afforded them under the 14th Amendment of the U. S. Constitution. (Section 1).

## CONSTITUTION AND STATUTES INVOLVED

Arkansas Statutes Annotated: 43-201: Issuance for stolen or embezzled property.

> "Upon complaint being made on oath, before any officer authorized to issue process for the apprehension of offenders, that any personal property has been stolen or embezzled, and that the complainant suspects that such property is concealed in any particular house or place,

if such officer shall be satisfied that there is reasonable ground for such suspicion, he shall issue a warrant to search for such property. (Rev. Stat., ch. 45, 15; C.&M. Dig., 2890; Pope's Dig., 3706)"

Arkansas Statutes Annotated: 43-202: To whom directed.

"Such warrant shall be directed to the sheriff of the county or to any constable and shall command him to search the place where such property is suspected to be concealed, in the day time, which place shall be designated, and the property particularly described, and bring such property before the magistrate issuing the warrant. (Rev. Stat., ch. 45, 16; C.&M. Dig., 2891; Pope's Dig., 3707.)"

Arkansas Statutes Annotated: 43-203. In night time.

"If there be positive proof that any property stolen or embezzled is concealed in any particular house or place, the warrant may order the searching of such house or place in the night time. (Rev. Stat., ch. 45, 17; C.&M. Dig., 2892; Pope's Dig., 3708)."

Ark. Const., Art. 2, 15, provides as follows:

"The right of the people of this State to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

United States Constitution, 14th Amendment, Section 1: Due process of law:

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

In this brief pages of the evidence introduced at the hearing of the Motion to Suppress will be referred to by the prefix (Supp.) while the pages contained in the Court Reporter's transcript of the trial will be designated by the prefix (TR.).

## STATEMENT OF FACTS

On the 18th day of April, 1967, Sheriff John Davis, who incidentally was the only witness at the trial of the petitioners, testified that he received a call to come to Bald Knob, Arkansas, as they had four persons, the petitioners herein and one Odham, under surveillance. When he, Sheriff Davis, arrived he found numerous law enforcement personnel present. This included the Federal Bureau of Investigation agents, local Bald Knob, Arkansas, police authorities, Arkansas Crime Bureau and the Highway Patrol. After conferring with the authorities he noted that one of the petitioners, Odham, made a phone call but that nothing was done by any of the petitioners that was suggestive of any unlawful activity. The Sheriff then proceeded to the offices of the Justice of the Peace of Bald Knob, Arkansas, who was also the Mayor of said town. The Sheriff testified that he made an affidavit (which was never introduced or shown to have existed) to the Mayor Fox, (Supp. 40) who then issued a search warrant to search the two rooms at the Americana Motel where the petitioners had rented two rooms and a 1955 Chrysler automobile with a U-Haul trailer attached thereto which the petitioners were alleged to have arrived in. The Sheriff further testified that he proceeded to the rooms at the Americana Motel in Bald Knob, Arkansas, and advised the petitioners therein that he was going to search the premises. This was after dark between 9:00 p. m. and 9:30 p. m. the night of April 18, 1967. (TR.

49) There is a conflict of evidence here as to whether or not the Sheriff ever executed the warrant. At the evidentiary hearing on the petitioners' motion to suppress the evidence, petitioner, Davidson, testified that no search warrant was ever exhibited to him in the process of the search. (Supp. 13) The Sheriff testified that after searching the motel rooms where he failed to find or seize any evidence he went to the 1955 Chrysler automobile and searched it and seized certain tools which consisted of a pair of common plyers, an adjustable crecent wrench, two vice-grip plyers, small hand drill and some gloves. (TR. 22) Davidson testified these tools were used in his trade as a concrete finisher. (Supp. 15) After completing his search he withdrew but still keeping the petitioners herein under surveillance. (TR. 23) Later, he observed a Mrs. Odham drive up, who was the wife of the fourth man, Odham, who was charged with the petitioners but not tried in the case at bar. The Sheriff asked her for identification which she produced. The Sheriff did not make any arrest. Later the petitioners, with Odham, got into the 1955 Chrysler automobile and proceeded down the highway where they were again stopped on orders of Sheriff Davis. When Sheriff Davis arrived the petitioners were outside the car and that he, Davis, made a thorough search of the automobile and seized a craftsman electric drill which was in the truck of the vehicle which he stated had not been there on his previous search some 2 hours earlier. (TR. 26) That after seizing the drill, he placed all the petitioners under arrest (TR. 62) and transported them to the White County jail. While in route to placing the petitioners in the White County jail, the Sheriff called to the Bald Knob Chief of Police and asked him to get a search warrant for gambling equipment that he, Sheriff, had previously seen in the trailer when he

executed his original search (TR. 27-29) which was issued to him and apparently under this authority the gambling equipment was seized from the U-Haul trailer. That as a result of these searches and seizures, the evidence was introduced at the trial of the petitioners and they were convicted for the possession of burglary tools and gambling equipment in violation of Title 41-1006; Title 41-2001.

## PROPOSITION 1

**THAT THE SEARCH AND SEIZURE OF THE EVIDENCE IN CHIEF IN THE CASE AT BAR WAS SEIZED IN VIOLATION OF THE PETITIONERS' RIGHTS PROVIDED BY THE 14TH AMENDMENT OF THE U. S. CONSTITUTION.**

The petitioners, after being indicted but prior to trial, filed a motion to suppress (Appendix B) the evidence seized and moved the Court to suppress the evidence in their case. Subsequent to this, they filed an amended motion to suppress (Appendix C). A hearing was held on the 13th day of July, 1968, on both the motion and amended motion and the petitioners were overruled.

Petitioners set forth in their motion that the search of the motel room, vehicle and automobile trailer was against their will and was made without a search warrant. Petitioner, Davidson, testified that when the Sheriff entered the motel rooms he had a piece of paper in his hand and then put the paper into his shirt pocket and never displayed it to any of the petitioners who were all in the room when the Sheriff entered. That petitioner Davidson, asked to see the paper but was ignored by Sheriff Davis. Petitioner, Davidson, further testified that the tools which the Sheriff seized later from the 1955 Chrysler automobile were tools used

by him in his trade as a cement finisher. Petitioners state they are entitled to suppress the evidence in the case at bar quoting from *Jones v. U. S.*, 362 U. S. 257, 80 S. St. 725:

> "Where a criminal charge against a defendant is based on possession, the defendant is by that very fact a person aggrieved by an unlawful search and seizure and may raise the question without claiming possession."

There were three searches involved in the case at bar:

1. Search of the motel rooms, car and trailer by Sheriff Davis.

2. Search of the petitioner's automobile on the highway.

3. Search of the petitioners' U-Haul trailer after they were incarcerated.

It is the petitioners' contention that if the first search is illegal then all evidence of information received from the illegal search that reulted in the subsequent arrest of the petitioners would be of no avail to the State. *Byars v. U. S.*, 273 U. S. 28, 47 S. Ct. 248, it was said:

As stated in *Byars v. U. S., supra*:

> "Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed."

The petitioner, Davidson, testified that the Sheriff never

showed him a warrant for his first original search. The Sheriff later denied this and the state introduced into evidence a warrant that was issued by the Mayor of Bald Knob, Arkansas, for the search of the rooms, car and trailer of the petitioners. The Sheriff testified he had made an affidavit for the issuance of the search warrant. The State failed to produce the affidavit to show the validity for the issuance of said warrant.

The first proposition to be ascertained is: is the first search warrant valid on its fact and if so, was the execution of the search warrant legal. It should be noted that the Sheriff testified that he executed the search warrant herein (regardless of whether or not it was shown to the petitioners) at 9:00 o'clock p. m., after dark, on the 18th day of April, 1967. The search warrant is described as follows:

SEARCH WARRANT NO. 1

STATE OF ARKANSAS)
) ss
COUNTY OF WHITE )

_____:
: ss
_____:

The State of Arkansas, To any Sheriff, Coroner, Constable or policeman in the State:

WHEREAS, Complaint has been made, on oath, before the undersigned, one of the Justices of the Peace in and for the County of White by John Davis, Sheriff, that certain personal property of _____, to-wit: burglary tools has been stolen, or embezzled, and that the said complainant suspects that such property is concealed in the House occupied by one 1955 Chrysler,

one trailer, Rooms 110-111 of Americana Motel, Bald Knob, Arkansas in said County; and, WHEREAS, being satisfied that there is reasonable ground for such suspicion, YOU ARE THEREFORE HEREBY COMMENDED, To search the said place above mentioned, where such property is suspected to be concealed, in the ——— ——— time, and to bring such property, or any part thereof which may be found, before me, the Justice, forthwith. Hereof fail not, and make return of this writ.

Given under my hand, this 18th day of April, 1967.

/s/ Norris Fox, J. P.

(Back of search warrant No. 1)

STATE OF ARKANSAS )
) ss
COUNTY OF WHITE )

I have this 18th day of April, 1967, made diligent search of the within described premises, and 2 pair vice grips, 1 Craftsman electric drill, 1 hand drill, 1 pair electric gloves. The Craftsman electric drill was found on the second search.

_____ Constable

Returned and filed _____ 19——

_____ J. P.

This warrant was issued under the pertinent statutes heretofore set forth:

Arkansas Statutes Annotated: 43-201: Issuance for stolen or embezzled property.

Upon complaint being made on oath, before any of-

ficer authorized to issue process for the apprehension of offenders, that any personal property has been stolen or embezzled, and that the complainant suspects that such property is concealed in any particular house or place, if such officer shall be satisfied that there is reasonable ground for such suspicion, he shall issue a warrant to search for such property. (Rev. Stat., ch. 45, 15; C. & M. Dig., 2890; Pope's Dig., 3706)

Arkansas Statutes Annotated: 43-202: To whom directed.

Such warrant shall be directed to the sheriff of the county or to any constable, and shall command him to search the place where such property is suspected to be concealed, in the day time, which place shall be designated, and the property particularly described, and bring such property before the magistrate issuing the warrant. (Rev. Stat., ch. 45, 16; C. & M. Dig., 2891; Pope's Dig., 3707.)

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If there be positive proof that any property stolen or embezzled is concealed in any particular house or place, the warrant may order the searching of such house or place in the night time. (Rev. Stat., ch. 45, 17; C. & M. Dig., 2892; Pope's Dig., 3708)

Ark. Const., Art. 2, 15, provides as follows:

"The right of the people of this State to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

United States Constitution, 14th Amendment, Section 1: Due process of law.

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

As shown on the face of the warrant as to what time, whether day or night, the warrant was to be served is left blank. Title 43-202, Ark. Stat. Ann., specifically states that the search warrant must be executed in the day time unless the provisions as set forth in Arkansas Statutes Annotated, Title 43-203 are met then the warrant must show on its face that it is to be served in the night time. It is the petitioners' contention that the first warrant in the case at bar is not valid on its face because it has not complied with the Constitution and statutory requirements pertinent to its issuance.

The search warrant, and the statements upon oath or affirmation upon which probable cause is based, must conform strictly to the Constitution and the valid statutory laws which permit a search and seizure. *U. S. v. Rembert*, 284 F. 996; *White v. Wagar* (1900) 185 Ill. 195, 57 N. E. 26, 50 L.R.A. 60; *Reed v. Rice*, 2 J. J. Marsh. (Ky) 44, 19 Am. Dec. 122.

Statutes which relate to search and seizure must be strictly construed in favor of the constitutional right of the people. *Guenther v. Day* (1856) 6 Gray (Mass.) 490; *Leonard v. U. S.* (C.C.A. 1925) 6 F. (2d) 353, 355.

The constitutional guaranty against unreasonable search and seizure must receive a liberal construction, in its application to guarantee such right to the people. *Gouid v. U. S.* (1921) 255 U. S. 298, 304, 41 S. Ct. 261; 65 L. Ed. ...; *Flum v. State* (1923) 193 Ind. 585, 141 N. E. 353; *Boyd v. U. S.* 116 U. S. 616, 635, 6 S. Ct. 524, 29 L. Ed. 746.

In executing a search warrant, there must be a strict compliance with whatever formalities are required by law.

*U. S. v. Borkowski* (D. C. 1920) 268 F. 408; *Reed v. Rice, supra; Flum v. State, supra.*

The statutes of Arkansas, Title 43-201, 202, 203 are analogous to Federal Rules and Procedures, U.S.C.A. 41 (c) as stated in *U. S. v. Kuplen,* 286 Fed. 970:

> "The warrant shall direct that it be served in the daytime, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case the warrant may contain a direction that it be served at any time of the day or night."
>
> "If a search be made in the nighttime, authorized by a warrant not supported by an affidavit stating positively that the property was on the person or in the place to be searched, the search would be illegal. U. S. v. Borkowski, 268 Fed. 410, U. S. v. Yuck Kee, 281 Fed. 288."

It is obvious from the reading of the search warrant that it had been obtained hastily as it is a search warrant for the recovery of stolen burglary tools but leaves blank the party from whom the tools were stolen and when the warrant was to be executed.

We submit that the warrant because of the depletion of when it was to be served and the evidence by the Sheriff as to when it was served shows that the execution of the same was in direct violation of the constitution and pertinent statutes to which the issuance of the warranty was directed. Therefore, the warrant was invalid on its face and void and any evidence seized thereunder should be inadmissible. *Mapp v. Ohio,* 367 U. S. 643.

If the warrant is presumed to be valid on its face we must first ascertain whose duty it is to prove the issuance

of same is valid. Petitioners stated that when they raised an objection to the search and seizue of their property, by filing of the motion to suppress (Appendix B & C) wherein they claimed that said search and seizure of their motel rooms, car and trailer was committed against their will and without a search warrant. The State was put on notice, at this time that the seizure of the property was unlawful. The petitioner, Davidson, testified that he never saw a search warrant and when he demanded to see a warrant was ignored and that property was seized (Supp. 16).

Here the petitioners supported their burden of proof and so the burden shifted to the State to show the seizure of the property was lawful so they were compelled to show the warrant was issued and executed according to law. The State introduced the search warrant into evidence but failed to introduce into evidence the affidavit, which the Sheriff stated he made, on which the magistrate or Mayor could show the grounds or reasons for his issuance of said search warrant.

It is the petitioners' contention that the burden of proof was upon the State to show that proper evidence was put before the magistrate to show *probable cause* for the issuance of the search warrant. The petitioners further contend that even if the affidavit was sufficient on its face, the evidence produced at the hearing on the pre-trial motion to suppress and at the trial failed to establish probable cause for the issuance of the warrant. As stated by Judge Hahn in *U. S. v. Casino,* S.D.N.Y., 286 Fed. 976, 978:

> "The showing for the issuance of a search warrant must be enough to stand alone and must be proved upon hearing if challenged."

A search warrant may not properly issue "upon mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances." *Nathanson v. United States*, 290 U. S. 41, 47, 54 S. Ct. 11, 13, 78 L. Ed. 159 (1933); accord, *United States v. Lassoff*, 147 F. Supp. 944 (E.D. Ky. 1957).

There is not a scintilla of evidence except from the Sheriff himself to show why the warrant was issued. The warrant on its face does not show any basis for probable cause and the only evidence is the testimony of Sheriff Davis presented at the hearing on the motion to suppress and at the trial in chief established, taken in all its entirety, that he had information but what type information he had is left to conjecture and that the petitioners did nothing in his presence or anyone else's presence to leave the inference that they were violating the law. In the case at bar, we have simply a search warrant that was issued from the testimony of the affiant himself on nothing more than information and belief. The consensus of judicial opinion where this question has been thoroughly considered upon principal and sound reasoning, is that a search warrant issued upon an affidavit of mere belief, or on information and belief, is insufficient upon which to base a finding of probable cause, and its issuance under such circumstances would be without warrant of law. *Ripper v. U. S.*, 178 Fed. 24; *Weeks v. U.S.*, 22 U. S. 383, 34 S. Ct. 341; *Veeder v. U. S.*, 252 Fed. 414; *Smoot v. State*, 128 S.E. 909.

The petitioners are aware of rules set down in *Jones v. U. S.*, 362 U. S. 257, 80 S. Ct. 725, 9 L. Ed. 697; supporting the fact that a warrant may be issued upon hearsay information but it was held that the affiant must set forth from whom he received the information and also the validity and reliability from which it came. In the case at bar, the affiant

never stated from where his information was obtained and whether or not it was reliable.

The purpose of the affidavit or oath of affirmation is to represent to the magistrate to determine whether the probable cause required to support the issuance of a search warrant existed. It is encumbent upon the magistrate to judge for himself the pursuasiveness of the facts relied upon by a complaining agent to show probable cause and not to accept without question the Sheriff's mere conclusions that the articles sought were possessed by the person or car and issue a warrant on these conclusions. *Giordenello v. U. S.*, 357 U. S. 480, 78 S. Ct. 1245, 2 L. Ed. 1503.

In the enforcement of this safeguard against unlawful searches and seizures, it is generally held that a search warrant should not be issued upon the affidavit of a government officer which merely shows that he is in possession of information which gives him cause to believe that the accused is in possession of property in violation of the criminal law on the premises described in the warrant without revealing the sources of his information or the grounds of his belief. *Byars v. U. S.*, 273 U. S. 28, 47 S. Ct. 248, 71 L. Ed. 520; *Nathanson v. U. S.*, 290 U. S. 41, 54 S. Ct. 11, 78 L. Ed. 159; *Sutherland v. U. S.*, 4 Cir., 92 F. 2d 305; *Aquilar v. Texas*, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723.

As stated in *Veasey v. State*, 147 S. E. 2d 516:

"Probable cause cannot be made out by affidavits which are purely conclusory. U. S. v. Ventresca, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684; Smoot v. State, 160 Ga. 744, 128 S. E. 909, 41 A. L. R. 1533. The guarantees of the State and Federal Constitutions (Code 1-804, 2-116, Const. art. I, i, par. XVI) are that no such war-

> rant shall issue save 'upon probable cause, supported by Oath or affirmation.' That statement of the affiant that he presented evidence which was sufficient to make a showing of probable cause is but a conclusion, and the repetition of this language in the warrant itself, if approved on the theory that judicial officers are presumed to do their duty, would result in the denial of the Defendant's right to have a determination by a reviewing court of the magistrate's judicial discretion in issuing the warrant, which might, in the event of error, nullify the guarantee. If, therefore, the magistrate issuing the warrant does so not on the basis of the affidavit but or other testimony, such testimony should itself be produced when, on the trial of a criminal case, the affidavit and warrant are challenged. The factual matter, however presented, constitutes the passport without which the warrant is but a ticket to interdicted territory-a means of entry without a showing of the right to enter. *The burden of showing that probable cause exists is on the State.*" See also *Wallace v. State*, 157 N. E. 658.

The Fourth Amendment forbids the issuance of warrants except "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Probable cause does not require the quantum of evidence needed to prove guilt, nor on the other hand can it be equated with bare suspicion. It exists "if the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed." *Stacey v. Emery*, 97 U. S. 642, 645, 24 L. Ed. 1035 (1878), quoted with approval in *Carroll v. United States*, 267 U. S. 132, 161, 45 S. Ct. 280, 288, 69 L. Ed. 543 (1925).

> "These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also

seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions or probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officer's whim or caprice." *Brinegar v. U. S.*, 338 U. S. 160, 176, 69 S. Ct. 1302, 1311, 93 L. Ed. 1879 (1949).

We are left then, with an affidavit based upon hearsay information, the reliability of which is not established by other facts and circumstances set forth in the affidavit. In the case at bar, we have not the affidavit which was the basis for the issuance of the first search warrant. All we have before us is the evidence presented at the petitioners' motion to suppress and at the trial in chief. It is petitioners' contention that even under the "practical, nontechnical" standards of probable cause, *Brinegar v. U. S., supra,* this is too weak a basis to support intrusion into a private dwelling. And it will not do to say that a search which is not properly authorized may be justified by what it uncovers. *U. S. v. DiRe,* 322 U. S. 581, 68 S. Ct. 222, 92 L. Ed. 210 (1948).

A careful look at the search warrant would lead one to believe that the Commissioner was acting, not independently, but as the officers wished him to in the procurement of the warrants. This is evidenced by the failure of the magistrate to state in the warrant whose name the warrants were issued in, as the Sheriff testified he knew the peti-

tioners, who the party was, from whom the property, burglary tools, had been stolen and the failure to designate when the warrant was to be issued as to the daytime or nighttime as was required by the Arkansas Statutes Annotated, 43-202 and 43-203. This is further evidenced by the testimony of Sheriff Davis, the affiant, who stated that he radioed to the Chief of Police of Bald Knob, Arkansas, to secure another warrant for the search of the U-Haul trailer. Is this type of action in the securing of a search warrant to be condoned by the Courts? We think not.

As stated in *Johnson v. U. S.*, 333 U. S. 10, 13-14, 68 S. Ct. 367, 92 L. Ed. 436:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the peoples' homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search, is, as a rule to be decided by a judicial officer, not by a policeman or Government enforcement agent."

Again we state, and as quoted from *Baysden v. United States*, 271 F. 2d 325:

> "Generally, a search warrant should not issue upon affidavit of a Government officer merely showing that he has possession of information which gives him cause to believe that accused is in possession of property in violation of criminal law on premises described in warrant without revealing sources of his information or grounds of his belief. Fed. Rules Crim. Proc. rule 41 and subd. (c), 18 U.S.C.A.; U.S.C.A. Const. Amend. 4."

It is the petitioners' contention that the search of the automobile is illegal. The State contends that the search of the automobile on the highway is a continuing search based on the issuance of the first search warrant to search the motel rooms, automobile and trailer. This we do not believe is so as the evidentiary facts clearly show that the Sheriff made a search of the motel rooms, car and trailer and then withdrew. (Tr. 22) The petitioners further state that this is an abandonment of the search and that a second search under the guise of a previous warrant would be to violate the petitioners' constitutional rights to security of property from unreasonable searches. As stated in *McDonald v. State*, 259 S. W. 2d 524:

> "In so far as we can find, the question stated has arisen in the Courts of only three States, and never within our own. In each of the three cases found such second search has been held to be unreasonable within the meaning of the constitutional provision mentioned. Coburn v. State, 78 Okl. Cr. 362, 148 P. 2d 483; State v. Moran, 103 W. Va. 753, 138 S. E. 366; Gamble v. Keyes, 35 S.D. 644, 153 N. W. 888. For analysis of these cases see 79 C.J.S., Searches and Seizures, 83, page 897; 74 A. L. R. page 1515; and 3 A. L. R. page 1521, respectively."

To allow numerous searches under one search warrant could become a means of tyranical oppression in the hands of an unscrupulous officer to the disturbance or distinction of his peaceful enjoyment against whom the agents of such officers are directed. So, as well as on persuasive precedent and sound public policy a second search of premises under a search warrant that has only been once served with reference to these premises is an unreasonable search within the meaning of our constitution and any evidence obtained by reason of such search is therefore incompetent. It should be noted that this second search was some two hours later at a different location (Supp. 46-47).

The second search of the automobile could not have been based on a valid arrest as the testimony of the Sheriff shows that he stopped the automobile on the highway and then proceeded to search the automobile again and that on the search of the turtle hull he found a Craftsman electric drill *and that as a result of the finding of said drill* he placed the petitioners under arrest.

RE-CROSS EXAMINATION

(Tr. 60-66)

Mr. Davis continued to testify as follows:

> The first search was made while they were in the motel. There were no arrests made because we had information there was another car coming in. I don't know whether they had checked out or not. The second time they were leaving the motel. The arrest was made while they were in the car. The craftsman drill was found the second search in the trunk of Mr. Davidson's car (Tr. 62).
>
> Finding this and other things prompted me to make

the arrest. I had not made an arrest up until then. I had not seen the drill in the car before that I recall. I had seen the wrenches and pliers.

"Q. There is nothing unusual about it?

"A. No, sir.

"Q. But the thing that was unusual was the drill?

"A. Yes, sir, that and other things."

As stated in *U. S. v. Lefkowitz*, 285 U. S. 452, 52 S. Ct. 420; *Go Boat Importing Co. v. U. S.*, 282 U. S. 344, 51 S. Ct. 153, and *Manon v. U. S.*, 257 U. S. 192, 48 S. Ct. 74:

"A search cannot be upheld which is merely exploratory and made solely to find evidence of guilt."

The reasonableness of the search is to be tested on facts and circumstances and in a case of this kind it is important to view the facts against the background of the total atmosphere of the case. So viewed, in the case at bar, it is apparent that the search was incident to the arrest. In the case at bar from the statement of the Sheriff himself he did not feel that he was justified in making an arrest until he had searched the petitioners' car a second time and found a Craftsman electric drill therein. Should the search be upheld as a reasonable one within the meaning of the Constitution? Manifestly not.

The State might argue that the arrest was a legal one due to the fact that certain tools were seized in the first search of the motel rooms, car and trailer but it is the petitioners' contention that any knowledge, information or evidence seized on the first search was illegal as heretofore set forth and that to allow the illegal evidence secured by the first search warrant the arrest of the petitioners would

violate their constitutional rights under the "Fruit of the Poisonous Tree" doctrine set forth in *Silver Thorn Lumber v. U. S.*, 251 U. S. 40 S. Ct. 182, 64 L. Ed. 319; *Nordon v. U. S.*, 308 U. S. 338, 60 S. Ct. 266; 84 L. Ed. 307; *Weeks v.* U. S., 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652; *McDonald v. U. S., supra;* and *Di Re v. U. S., supra.*

As to the third search it was the search of the U-Haul trailer for part of the gambling equipment that was introduced into evidence was done on a search warrant which was issued by Mayor Fox of Bald Knob, Arkansas, and as set forth herein:

STATE OF ARKANSAS )
) ss
COUNTY OF WHITE )

_____
) ss
_____)

The State of Arkansas, To any Sheriff, Coroner, Constable or Policeman in the State:

WHEREAS, Complaint has been made, on oath, before the undersigned, one of the Justices of the Peace in and for the County of White by John Davis, Sheriff, that certain personal property of _____, to-wit: gambling devices has been stolen, or embezzled, and that the said complainant suspects that such property is concealed in the House occupied by one 1955 Chrysler, one trailer in said County; and, WHEREAS, Being satisfied that there is reasonable ground for such suspicion, YOU ARE THEREFORE HEREBY COMMANDED, To search the said place above mentioned, where such property is suspected to be concealed, in the _____, time, and to bring such property, or any part thereof which may be found, before

me, the said Justice, forthwith. Hereof fail not, and make return of this writ.

Given under my hand, this 18th day of April, 1967.

s/ Norris Fox, J. P.

(Back of Search Warrant No. 2)

STATE OF ARKANSAS )
) ss
COUNTY OF WHITE )

I have this 18 day of April, 1967, made diligent search of the within described premises, and 1 crap table wired with magnet, 2 large batteries with coils and other paraphernalia to operate and quantity of dice designed for magnet table.

_____ Constable

Returned and filed _____ 19____

_____ J. P.

This search warrant is essentially the same as the search warrant that was issued for the first search of the petitioners' motel rooms, car and trailer. Your petitioners state that the argument addressed to this Honorable Court as to the first search warrant would apply here as to the second search warrant as again the affidavit for the issuance of said search warrant was not placed into evidence and the testimony of the Sheriff states that he got a search warrant for the gambling equipment that he had seen on the previous search and petitioner respectfully submit that the information and knowledge obtained from the first search warrant was illegal and inadmissible and to allow Sheriff Davis to procure a warrant on evidence obtained under the first illegal seizure would be in violation of the petitioners'

constitutional rights as in "Fruits of the Poisonous Tree" doctrine as heretofore discussed, *supra.* As stated in *Wallace v. States supra.*

"The Constitution is imperious. We turn to it as a refugee to protect our very social and political life, instead of disobeying its wholesale commands. It is for all the people. The mantle of its protection falls without discrimination, and without respect of persons, upon all. The benevolence of its power estops him who would cross the threshold of those under suspicion of guilt, as well as of the innocent, unless by virtue of probable cause therefor, judicially determined. To secure a search warrant by means not warranted by the Constitution, according to its plain language, is to evade the law. The law knows no evasion."

## CONCLUSION

For the foregoing reasons it is respectfully prayed that this Court grant this petition for writ of certiorari.

Respectfully submitted,

JEFFERSON GREER and
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Tulsa, Oklahoma

*Attorneys for Petitioners*

# APPENDIX

## APPENDIX A

JAMES WILLIAM MOORE, JAMES THOMAS FRASIER AND GLENN E. DAVIDSON v. STATE OF ARKANSAS

Opinion delivered June 3, 1968

1. SEARCHES & SEIZURES—VALIDITY OF WARRANT—PRESUMPTION.—Where a search warrant is regular on its face and no proof that the oath or affirmation was not made prior to its issuance, there is a presumption as to its validity.

2. SEARCHES & SEIZURES—VALIDITY OF WARRANT—PRESUMPTIONS & BURDEN OF PROOF.—In view of the facts, appellants failed to meet the burden incumbent upon them to show that the first search warrant was invalid.

3. CRIMINAL LAW—EVIDENCE—ADMISSIBILITY OF ARTICLES SEIZED IN VALID SEARCH.—Where first search warrant was valid, evidence seized as a result was admissible and motion to suppress was properly overruled.

4. SEARCHES & SEIZURES—REASONABLENESS—WEIGHT & SUFFICIENCY OF EVIDENCE.—Reasonableness of a search must be decided upon its own facts and circumstances.

5. SEARCHES & SEIZURES—VIOLATION OF CONSTITUTIONAL RIGHTS—WEIGHT & SUFFICIENCY OF EVIDENCE.—Record failed to reflect an unconstitutional invasion at the time of the second search where it was but a continuation and consummation of the first and officers had reasonable cause to believe that other evidence and other persons would be involved.

6. SEARCHES & SEIZURES—SEARCH INCIDENT TO LAWFUL ARREST—VALIDITY.—Second search held lawful where it was incident to a lawful arrest and substantially contemporaneous therewith.

7. SEARCHES & SEIZURES—VIOLATION OF CONSTITUTIONAL RIGHTS—WEIGHT & SUFFICIENCY OF EVIDENCE.—Where a gambling table was identified without a trespass on officer's part, this was not a search prohibited by the constitution.

8. SEARCHES & SEIZURES—GAMBLING DEVICES—QUESTIONS FOR JURY.—In view of the facts, question of whether the table involved in the search was a gambling device was properly submitted to the jury.

9. BURGLARY—POSSESSION OF BURGLARS' TOOLS—SUFFICIENCY OF EVIDENCE.—When it is shown, or is obvious, that the particular combination of group of tools in question is such that their use in lawful occupations or for legitimate purposes is common and ordinary and that many people might well be expected to have such a combination of tools in their possession at any time in the circumstances under which they are found, their possession cannot be a violation of the statute, regardless of the fact that they might conceivably be used for breaking and entering building or any of the other structures named in the statute.

10. BURGLARY—POSSESSION OF BURGLARS' TOOLS—SUFFICIENCY OF EVIDENCE.—When it is shown that the particular combination of tools consists of implements commonly used for the purpose of burglarizing any of the structures named in the statute and it is not shown, and is not obvious, that the particular combination of tools is such as is commonly used in any lawful occupation or in general use for legitimate purposes, such that the tools will likely be found in the lawful possession of numerous persons, in the circumstances under which they are found, a jury question as to whether the possession of the tools is in violation of our statute arises.

11. CRIMINAL LAW—TRIAL—EVIDENCE OF BAD CHARACTER.—The fact that the sheriff, in answer to a question, stated he knew one of the defendants by reputa-

tion, did not amount to evidence of bad character or prejudice appellants in any way.

12. CRIMINAL LAW—APPEAL & ERROR—REVIEW. Where the allegations of error asserted for reversal were not embraced in objections to the instructions, nor carried forward in the motion for new trial, the matters were not subject to review on appeal.

13. CRIMINAL LAW—TRIAL—STATEMENT OR PROSECUTOR AS COMMENT ON EVIDENCE.—Statements made by prosecutor in his closing argument held attributable to weight to be given to the evidence and did not call jury's attention to the fact appellants failed to testify.

Appeal from White Circuit Court, *Elmo Taylor*, Judge; affirmed.

*W. M. Herndon* and *Darrell Hickman*, for appellants.

*Joe Purcell*, Attorney General; *Don Langston*, Asst. Atty. Gen., for appellee.

JOHN A FOGLEMAN, Justice. Appellants bring this appeal from the judgment of the White Circuit Court convicting them of possession of burglary tools and possession of gambling equipment. Eight points are urged for reversal. The facts pertinent to a decision in this case will be taken up as applicable to the points for reversal, which have been renumbered for purposes of this decision. (1) Appellants assert error in the trial court's failure to suppress certain evidence. This contention is based upon the alleged invalidity of the search warrants due to the alleged absence of an oath or affirmation and the asserted lack of probable cause for their issuance.

The record reflects that there were three searches involved and that, with regard to the first, the Sheriff of

White County obtained a search warrant to search appellants' motel rooms, the car in which they were traveling and the trailer attached to the car. The sheriff's testimony at the hearing on the motion to suppress and at the trial showed that he had information that appellants were at the motel and that they had burglary tools in their possession. He further stated that his decision to obtain a search warrant was reached after a period of surveillance of appellants' activities in and around the motel room and the car and trailer.

At the hearing on the motion to suppress, the State introduced the search warrants pursuant to which the searches were made. Although appellants subpoenaed the sheriff, several officers who had been involved in the search, and the justice of the peace who issue the warrants, only one person, appellant Glenn Davidson, was called in behalf of appellants. His testimony amounted to little more than a narration of the searches and arrests. No attempt was made to show facts indicative of the alleged lack of probable cause. While appellants contended that the warrants had been issued without oath or affirmation, the only evidence on this point was the testimony of the sheriff, who stated that an affidavit as to the facts and circumstances showing probable cause had been made.

In *Albright v. Karston,* 206 Ark. 307, 176 S. W. 2d 421, we held that where the search warrant is regular on its face and there is no proof that the "oath or affirmation" was not made prior to its issuance, there is a presumption that all things essential to its validity have been done. It was therefore the duty of appellants to come forward with evidence sufficient to rebut the presumption of validity. Additionally, we note the prevailing view that the burden

of proof on a motion to suppress is on the accused. *Andersson v. United States,* 344 F. 2d 792 (10th Cir. 1965); *People v. Williams,* 20 N. Y. 2d 388, 283 N. Y. S. 2d 169 (1967). In *Wilson v. State,* 268 P. 2d 585 (Okla. Crim. 1954), the Oklahoma court, in noting that the burden was on defendant on his motion to suppress, said:

> "The burden of proving the invalidity of a search warrant rests on the defendant, and where he files a motion to suppress evidence or objects to the introduction of evidence *on the ground the search warrant is not valid,* he should produce the affidavit and warrant in evidence in support of such motion or objection, or account for the failure to produce and offer other competent evidence to show invalidity."

See, also, 22A C. J. S. Criminal Law §§ 578 and 657(32) (a); Varon, *Searches and Seizures,* § 6(c). On the state of the facts in the case at bar, we feel that appellants have failed to meet the burden incumbent upon them to show that the first warrant was invalid. The evidence seized as a result of the first search was, therefore, admissible and the motion to suppress properly overruled.

With regard to the second search, appellants contended there was no probable cause therefor. After the first search, Sheriff Davis and his men withdrew from the premises but continued to keep appellants under surveillance, since the sheriff had information that another car was to make contact with appellants for the purpose of transferring burglar tools. During this period between the first and second searches, the wife of a companion of appellants came to the motel. Having been identified by the officers, she subsequently left. Thereafter, appellants got into the car and appeared to be leaving town when they were stopped. On this occasion the appellants were arrested and taken into cus-

tody. The result of the search was that a Craftsman Drill, not discovered during the first search, was found.

On the record before us, we feel that the second search was lawful and that the trial court was correct in its ruling that the evidence seized pursuant thereto was admissible. While there are numerous cases which state that a "return" search, conducted on the basis of the warrant issued for the original search, is not permissible, these cases seem to involve situations where the officers have completely abandoned the premises for a substantial period of time. See, *e. g., State v. Moran,* 103 W. Va. 753, 138 S. E. 366 (1927); *Coburn v. State,* 78 Okla. Crim. 362, 148 P. 2d 483 (1944); *McDonald v. State,* 195 Tenn. 282, 259 S. W. 2d 524 (1953); *State v. Pina,* 94 Ariz. 243, 383 P. 2d 167 (1963); Such is not the case here. The sheriff and his men, after making the first search and on information that there was to be a subsequent contact with appellants, withdrew from the premises, but maintained constant vigil until such time as the arrests and second search were made. The second search was but a continuation and consummation of the first. There was reasonable cause to believe that other evidence, and, possibly other persons, would be involved. The reasonableness of a search in any case must be decided "upon its own facts and circumstances." *Go-Bart Importing Co. v. United States,* 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374 (1931). We cannot say that this record reflects an unconstitutional invasion at the time of the second search.

There is another ground on which we find the second search to be lawful, and that is that it constituted a search incident to a lawful arrest. The first search had been made and the objects (consisting of two pairs of vice grips, a hand drill, and a paid of rubber gloves) lawfully seized. The of-

ficers thus had probable cause to arrest applicants for the crime of possessing burglary tools. Ark. Stat. Ann. § 41-1006 (Repl. 1964). While it might be better procedure to make an arrest immediately upon seizure of evidence, we hesitate, on the peculiar facts and circumstances of this case, to say that it was unreasonable for the officers to delay the arrests until such time as it appeared that no other parties were involved. The arrests being lawful, the officers acted within the bounds of reason in searching the immediate premises under the control of appellants. *Harris v. United States,* 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947); *United States v. Rabinowitz,* 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. 653 (1950). Although there is sufficient justification for holding that the arrests occurred as soon as the officers stopped the car in which the appellants were traveling, this would appear to be insignificant, since, in any event, the search and the arrests were "substantially contemporaneous." *Stoner v. California,* 376 U. S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964); *State v. Hoover,* 219 Ore. 288, 347 P. 2d 69, 89 A.L.R. 2d 695 (1959). Moreover, the fact that we are here concerned with the search of an automobile is significant. The courts, both federal and state, have long distinguished between searches of dwellings and vehicles. In the case of vehicles, the validity of the seizure is not dependent upon the right to arrest, but rather upon the reasonable cause the seizing officer has for the belief that the contents of the automobile offended against the law. *Carroll v. United States,* 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925); *Burke v. State,* 235 Ark. 882, 362 S. W. 2d 695; *Mann v. City of Heber Springs,* 239 Ark. 969, 395 S. W. 2d 557. For the reasons herein stated, we find that the second search was valid and reasonable under the circumstances of this case.

Appellants contended also that there was impropriety

in the third search which was carried out on the following day pursuant to another search warrant. Apparently, the basis for their contention is that there existed no probable cause for issuance of the warrant. The record indicates that during the course of the previously described searches, the sheriff observed a peculiar table which was wired, two large batteries, and another box containing :"some kind of device to operate the magnetism on the table." His suspicion that a gaming device had been uncovered was buttressed by the discovery of several pairs of dice in the suitcase of one of the appellants. The sheriff did not immediately take any action with regard to the table and the supporting apparatus, but waited until after the second search, at which time he radioed in to headquarters, instructing that a separate search warrant be obtained pursuant to Ark Stat. Ann. § 41-2009. The sheriff testified that he subsequently made an affidavit stating the facts constituting probable cause.

As in the case of the warrant for the first search, appellants have made no attempt to show that probable cause was lacking for the issuance of the warrant. It must therefore be held that they failed to meet the requisite burden of proof. Moreover, it is clear from the facts above stated that the gaming table was observed in open view at a time when the officers were lawfully on the premises conducting the previous searches. It has been held many times that where contraband articles are identified without a trespass on the part of the officer, there is not a "search" that is prohibited by the constitution. *Russell v. State,* 240 Ark. 97, 398 S. W. 2d 213; *United States v. Lee,* 274 U. S. 559, 47 S. Ct. 746, 71 L. Ed. 1202 (1927); *Ker v. California,* 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963). From all that appears of record, the table could have lawfully been seized at the time it was observed. The officers should not be condemned for

taking the added precaution of obtaining a search warrant. The table and supporting apparatus were properly admitted into evidence. (2) Appellants next contend that the evidence seized was not burglary tools or gambling equipment. We can quickly dispose of this contention insofar as it relates to the gambling equipment, as we feel that a clear case for the jury was made by the State. Appellants rely on *Burnside v. State*, 219 Ark. 596, 243 S. W. 2d 736, in which we reversed a conviction where the evidence involved consisted of a tape recorder, a ticker or teletype machine and a radio transmitter. We there said that where the device is not a gaming device *per se*, there must be evidence that the equipment was *used* as a gambling device before there can be a conviction under Ark. Stat. Ann. § 41-2001.

We feel that appellants reliance is misplaced, as the table here involved was *per se* a gambling device. The sheriff testified that, when he entered the trailer during the course of the first search, he saw "gambling equipment." He also called it a "crap table." Further, he described the device as a "* * * large table * * * with large batteries and this remote control which mechanized the top of the table." He also referred to a "diagram" and "instructions of how to hook it up." Pictures introduced in evidence indicated that it was no ordinary table but was improvised so that a metal bar beneath the top could be magnetized at will with a control device. The top of the table was boxed in by a rim which was approximately eight inches higher than the surface of the table. While there was some evidence that the table and the supporting apparatus were not so connected as to be presently operative, we deem this insignificant. The statute prohibits the keeping of any gaming device. The fact that the device is inoperative as a "crooked" or "rigged" device has no bearing on its status as a gaming device, although the

fact that a device is peculiarly wired and outfitted is evidence that it is a gaming device. Under the facts in this case, we feel that the question was properly submitted to the jury.

Appellants contended that the evidence seized as a result of the first and second searches did not constitute burglary tools. This contention has caused us much concern, as it has brought to our attention an unsettled area of our law. There are three cases, involving the sufficiency of the evidence to sustain a conviction for possessing burglary tools, which we feel are in need of reconciliation. These cases are: *Satterfield v. State,* 174 Ark. 733, 296 S. W. 63; *Prather v. State,* 191 Ark. 903, 88 S. W. 2d 851, and *Gossett v. State,* 242 Ark. 593, 414 S. W. 2d 631.

In the *Satterfield* case the tools involved were: two bolt cutters, four common hoe files, one ordinary hammer, two Stilson wrenches, a flashlight and a pistol. As noted in the *Gossett* case, the conviction there was reversed. We note the statement in the opinion to the effect that the tools were not burglary tools, but we do not take this case to stand for the proposition that the set of tools there involved were incapable, as a matter of law, of being held to be burglary tools. Our interpretation is guided by the court's action in affirming the overruling of a demurrer to the indictment and in remanding the case for a new trial. In holding that the demurrer to the indictment was properly overruled, the court said, in effect, that the charge of crime was sufficient. Reversal was because of a deficiency in the proof. Therefore, the case was remanded in order to give the State a chance to show that these were tools that were "adapted, designed or commonly used" by burglars for the purposes named in the statute rather than tools that *might* be so used. The act of remanding the case for a new trial clearly

indicates that the court felt that, if properly shown to be commonly used by burglars, the tools could be classified as "burglar tools."

In the *Prather* case the officers seized a sledge hammer with a shortened handle, a shortened punch, an ordinary screw driver, caps used to set off explosives, nitroglycerin, gloves or mittens, electric fuses, four pistols with extra cartridge clips, and a flashlight. While this array of tools might more easily be shown susceptible to use by burglars in their trade than one less nefarious, the court laid its emphasis on language to the effect that a fact question was involved:

> "Perhaps, no fixed rule or announcement should be made as a criterion for guilt or innocence, except *that in every instance the matter under investigation should be determined as a matter of fact,* controlled or explained by all of the conditions, circumstances, and such pertinent collateral matters as might be present." [Emphasis added]

The court noted that the fact that the tools might be capable of legal uses was not controlling. The State is entitled to establish facts tending to prove that the defendant had in his possession "such a group or selection of tools, devices, or materials as might be found to be more nearly suitable for breaking into houses, or opening locked doors and windows, or by explosive forces opening safes or strong boxes, where valuables might be stored or kept, than for any lawful purpose." In conclusion it was said that "a charge of this kind is like any other charge, one that may be or may not be susceptible of proof; in other words, it is a question of fact, which, when proved beyond a reasonable doubt, and so determined by a jury, there is little left for review on appeal."

*Gosser v. State*, supra, involved the seizure of combination of tools consisting of a tire tool, two screw drivers, a lug wrench and a bar used to remove tires from car wheels. The conviction was there reversed, the court noting that all the tools were such as were commonly used in connection with the operation of automobiles, except possibly screw drivers, which are common impliments in every home or shop. There was an understandable absence of any testimony tending to show that the tools were "more nearly suitable" for use by burglars than for lawful purposes. On the facts of the case, the import of the statement that *Prather* was "not controlling or even persuasive" is clear.

A consideration of these three cases gives rise to certain general principles applicable in burglary tool cases where the question is the sufficiency of the evidence:

1. When it is shown, or is obvious, that the particular combination or group of tools in question is such that their use in lawful occupations or for legitimate purposes is common and ordinary and that many people might well be expected to have such a combination of tools in their possession at any time in the circumstances under which they are found, their possession cannot be a violation of the statute, regardless of the fact that they might conceivably be used for breaking and entering buildings or any of the other structures named in the statute.

2. When it is shown that the particular combination of tools consists of implements commonly used for the purpose of burglarizing any of the structures named in the statute and it is not shown, and is not obvious, that the particular combination of tools is such as is commonly used in any lawful occupation or in general use for legitimate pur-

poses, such that the tools will likely be found in the lawful possession of numerous persons, in the circumstances under which they are found, a jury question as to whether the possession of the tools is in violation of our statute arises.

In the case at bar, the sheriff, who was the only witness to testify at the trial, stated that any one of the tools found might be used in some ordinary, lawful occupation. However, he also testified that such a combination of tools was adapted to, and commonly used for, breaking and entering. Even though he stated that a safe or vault could not be entered with these tools without a hammer and punch, he stated specifically that they were sufficient to afford entry into a building and were commonly used for that purpose. There is nothing in the record to indicate that this particular combination of tools was common to any particular occupation. While there was no explosives or weapons in the combination here, the court in *Prather* clearly pointed out that no particular item or circumstance determined whether the combination constituted the prohibited tools.

It is notable that among the items found there was a pair of rubber gloves. Gloves were also found among the tools in *Prather,* and it was there pointed out that, while gloves are used in many lawful pursuits, it was common knowledge that gloves are employed by burglars to avoid leaving finger prints. We find that a jury case was presented. The jury having determined that burglary tools were involved, there is "little" left for review on appeal." (3) Appellants' next contention is that the trial court erred in failing to discharge the jury and declare a mistrial after the prosecuting attorney mentioned the gambling device which had been in the lobby of the courthouse since the day before

the trial. The record shows that the trial of this case had been scheduled for the day before, but that it had to be rescheduled due to the crowded docket. We feel that the trial court properly denied the motion for a mistrial for the reason that there is nothing to indicate that appellants were prejudiced by the presence of the table in the courthouse. There is no evidence that any of the jurors saw the table, which had to be left on the first floor of the courthouse because of its weight. Further, as the jury was later permitted to view the table, we fail to see how appellants were prejudiced, even if we assume that it had been seen prior to trial.

(4) Appellants claim prejudicial error in the trial court's failure to declare a mistrial after Sheriff Davis, in answer to the question, "You knew Mr. Frazier?", replied, "I knew him by reputation. I knew about him in Woodruff County." The basis for their contention is that the reply, in the context used, indicated that the sheriff had reference to criminal activity of appellant Frazier. We cannot agree. The innuendo urged by appellants would require a strained view of a common expression used to signify merely that a person is known only casually. We cannot say that such expression amounted to evidence of bad character or that appellants were prejudiced in any way.

(5) Appellants assert as error the giving of two instructions in terms of Ark. Stat. Ann. §§ 41-1006 (possession of burglary tools) and 41-2001 (keeping a gambling device) on the alleged grounds that the instructions amounted to comments on the evidence and that the court, by so wording the instructions, ruled as a matter of law that the appellants were guilty of the felonies charged. We do not get to the merits of this contention for the reason that the alleged error has not been properly preserved for appeal. The

record reveals that appellants objected generally to the trial court's charge and specifically to the two instructions on the ground that, as a matter of law, the evidence seized was not burglary tools or gambling equipment. There was no other specification of error. As to the specific objection, we have held under point (2) that the evidence was sufficient to go to the jury. The allegations of error now asserted for reversal were not embraced in the objections to the instructions, nor were they carried forward in the motion for a new trial. Under these circumstances. the matters asserted are not now subject to review by this Court. *Cassell v. State*, 242 Ark. 149, ___ S. W. 2d ___; *Ford v. State*, 222 Ark. 16, 257 S. W. 2d 30.

(6) We next consider appellants' contention that statements by the prosecuting attorney in his closing argument were prejudicial in that they referred to appellants' failure to testify. This court has said in numerous cases that a defendant's election not to testify in his own behalf is a privilege which the law affords him, and that it is reversible error for the prosecutor to use words and phrases calculated to call such fact to the jury's attention. *Miller v. State*, 239 Ark. 836, 394 S. W. 2d 601; *Miller v. State*, 240 Ark. 590, 401 S. W. 2d 15. In the two cases just cited, the reference to the fact that appellants failed to take the stand was clear. In the first case the prosecutor argued the instructions of the trial court and said: "You are instructed this is a privilege to them to either testify or not to testify." In the latter case, the statement was: "The defendant has chosen not to take the stand and that is his privilege * * *." Reversal in such instances is clearly required, as there could scarcely be a more obvious comment on the defendants' failure to testify. The statements involved in the case at bar, however, are more nearly akin to those in *Davis v. State*, 96 Ark. 7,

130 S. W. 547, and *Cascio v. State,* 213 Ark. 418, 210 S. W. 2d 897. In the former case, the prosecutor had said: "* * * it is undisputed and undenied and he cannot deny it." This court held that the statement was an expression of opinion as to the weight of the testimony, not a comment on defendant's failure to take the stand. In the *Cascio* case, the statement was: "What explanation have they made of that?" which we held not to be susceptible of the meaning urged by the appellant. In the present case, the prosecuting attorney, in the course of his closing argument, made the following statements: The case was "uncontradicted and undenied"; "I will leave that because the record is bare"; "There is nothing else in here except the testimony and proof of the sheriff"; "There has been no proof as to who [certain equipment] belonged to, the testimony was that nobody would claim it, nobody has acquired it, nobody has come here today to acquire it"; and "If I was picked up with [the equipment introduced into evidence], there would be some explanation of what it was doing in my car and what I was doing with it." We feel that the expressions are all attributable to the weight to be given to the evidence, and that in no instance was the jury's attention called to the fact that appellants failed to testify.

Under their point number IV, appellants contended that there had been no voluntary consent to the searches described in our point number (1). In view of the fact that we have held the searches legal on other grounds, we find it unnecessary to take up that argument.

The judgment is affirmed.

BROWN, J., concurs; JONES, J., dissents in part; BYRD, J., dissents.

## APPENDIX B

### MOTION TO SUPPRESS EVIDENCE

"IN THE CIRCUIT COURT OF WHITE COUNTY, ARKANSAS STATE OF ARKANSAS VS. NO. 2157; PLAINTIFF; JAMES W. MOORE, JAMES T. FRAZIER, GLENN DAVIDSON AND JAMES L. ODOM, DEFENDANTS

"MOTION. Comes James W. Moore, James T. Frazier, Glenn Davidson and James L. Odom, defendants herein, by their attorneys, W. M. Herndon and Sol Russell, and respectfully allege and state:

"The defendants in this cause are residents of Little Rock, Pulaski County, Arkansas and respectfully state that the search made of the 1955 Chrysler automobile bearing Oklahoma License No. ..... at Searcy, Arkansas within the County of White, Arkansas be precluded from using the evidence against these defendants. That the infor-mentioned automobile was owned by Glenn Davidson. "That on the 18th day of April, 1967 the defendants herein were arrested at Searcy, White County, Arkansas and charged by an information filed by the Prosecuting Attorney's office with possession of gaming equipment and burglary tools. That these defendants were traveling down one of the State Highways of Arkansas when they were flagged down and stopped by the Arkansas State Police, who, after stopping the defendants on a routine check, proceeded to conduct a vehicle search. That said law enforcement officers demanded that defendants get out of the automobile and further demanded the keys to the trunk of said automobile to make a search of the same. That no search warrant was served or displayed by State Police Officers or other local law officials

making the search. That said officers illegally gained access to the automobile of the defendant Glenn Davidson and the contents therein in conducing an illegal and unlawful search without proper cause. That the aforesaid search and seizure was unwarranted and illegal in that it violates the Fourth Amendment of the Constitution of the United States and retention or use thereof of any property seized as evidence is incrimination and in unlawful as guaranteed by the Fifth Amendment of the United States Constitution. That upon information and belief forcible access was used to secure evidence, in violation of the aforementioned Constitutional provisions of the defendants. That said evidence was taken against the defendant's will.

"WHEREFORE, defendants respectfully pray for an Order declaring unreasonable, illegal and void the search made of the aforementioned automobile and that the Prosecuting Attorney of White County, Arkansas be precluded from using the evidence unlawfully gained in the trial of this cause, for all of which no previous application has heretofore been made to any Court.

W. M. HERNDON &
SOL RUSSELL

Attorneys for Defendants

By W. M. HERNDON"

## APPENDIX C

### AMENDED MOTON TO SUPPRESS

"IN THE CIRCUIT COURT OF WHITE COUNTY, ARKANSAS, STATE OF ARKANSAS VS. NO. 2157, PLAINTIFFS: JAMES W. MOORE, JAMES T. FRAZIER, GLENN DAVIDSON AND JAMES L. ODOM, DEFENDANTS

"AMENDED MOTON. Comes James W. Moore, James T. Frazier, Glenn Davidson and James L. Odom, defendants herein, by their attorneys, W. M. Herndon and Sol Russell, and by way of amendment to their motion to suppress the evidence in this cause, allege and stated:

"The defendants, James W. Moore, James T. Frazier, James L. Odom, are residents, of Little Rock, Pulaski County, Arkansas, and the defendant, Glenn Davidson, is a resident of the State of Oklahoma, and respectfully state that the search made of the 1955 Chrysler automobile bearing Oklahoma License No. ..... at Searcy, Arkansas, within the County of White, said automobile being owned by Glenn Davidson, be declared unreasonable, illegal and void and that the Prosecuting Attorney of White County, Arkansas, be precluded from using the evidence against these defendants.

"That on the 16th day of April, 1967 the defendants herein were charged by information filed by the Prosecuting Attorney's office of White County, Arkansas with possession of gaming equipment and burglary tools. That these defendants were initially contacted at one of the local motels in White County and their motel room, vehicle and automobile trailer were illegally searched under the direction of certain F.B.I. agents, State Police and members of the White Coun-

ty Sheriff's office against their will and *without a search warrant.* That they were not arrested during this illegal search and seizure at said motel. That when all the police officers left, having made no arrest, the defendants, after leaving the motel in their automobile, were stopped on the highway by the same State Police and Deputy Sheriffs and placed under arrest for possessing the alleged gaming equipment and burglary tools which the said officers discovered at the time of the illegal search at the motel aforesaid. That said officers gained access to the motel room, automobile and automobile trailer upon which they made their illegal search and without probable cause. That the aforesaid search and seizure was unwarranted in that it violates the Fourth Amendment of the Constitution of the United States and the retention or use thereof of any property seized as evidence is incriminating and is unlawful, as guaranteed by the Fifth Amendment of the United States Constitution and they are fundamental rights of these defendants which were violated and as such there has been made obligatory upon the States by the Fourteenth Amendment of the United States Constitution that the States declare such evidence inadmissible under the same rules as the Federal Courts. That upon information and belief forcible access was used to secure this evidence and/or evidence was obtained by illegal search and without probable cause, in violation of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States and Article 2, Section 15 of the Arkansas Constitution. That such evidence was taken against the defendants' will.

"WHEREFORE, defendants respectfully pray for an Order declaring unreasonable, illegal and void the search made of the aforementioned motel room, automobile and automobile trailer and that the Prosecuting Attorney of White Coun-

ty, Arkansas be precluded from using the evidence unlawfully gained in the trial of this cause, for all of which no previous application had heretofore been made to any Court, except the original Motion filed in this cause.

W. M. HERNDON &
SOL RUSSELL

Attorneys for Defendants

By W. M. Herndon."